

**OPINION
75-104**

September 22, 1975 (OPINION)

Mr. Robert P. Bennett
Assistant State's Attorney
Burleigh County Courthouse
Bismarck, ND 58501

Dear Mr. Bennett:

This is in response to your letter of July 28, 1975, wherein you request an opinion of this office relative to Section 12.1-30-03(28) of the North Dakota Century Code, as amended, as the same relates to Sunday closing laws. You submit the following facts and inquiry in your letter:

This office requests an opinion as to the scope of Section 12.1-30-03 of the North Dakota Century Code as it relates to the definition of owner-manager of grocery stores exempted from the Sunday closing laws under subsection 28 of that section.

Section 12.1-30-03(28) states as follows:

The operation of any of the following businesses shall be allowed on Sundays:

8. Grocery stores operated by the owner-manager who regularly employs not more than three employees for the operation of said store.

The facts behind this inquiry are as follows: The owner of a small family-owned grocery store currently within the purview of Section 12.1-30-03(28) of the North Dakota Century Code, desires to incorporate that business. The owner, who is also the manager, would retain the majority of stock in the corporation either individually or in joint ownership with his wife.

An Attorney General's opinion dated April 26, 1972, to Mr. John Garass, Cass County State's Attorney, made it clear that the owner-manager must be the same person to fall within the exemption of Section 12.1-30-03(28) of the North Dakota Century Code. However, since that opinion did not discuss the effect of incorporation upon a grocery store already meeting the requirements of that subsection, we have two questions related to such action.

First, if a family grocery store is incorporated and the current owner-manager is majority shareholder of that corporation, will such a store fall within the exemption of Section 12.1-30-03(28), assuming that all other requirements are met and the majority shareholder continues to manage said store?

Second, if the answer to question #1 is in the affirmative,

must the current owner-manager hold the majority stock in the corporation individually or can it be held in joint ownership with his wife or another person to allow the store to retain its exemption under Section 12.1-30-03(28)?

You have correctly referred to an opinion of this office dated April 26, 1972, to Mr. John Garass, Cass County State's Attorney, wherein we expressed the opinion that the "owner-manager" referred to in the exemption statute must be the same person to claim the exemption provided for by the statute. We stated as follows:

With initial regard to your first question, whether the term "owner-manager" includes the situation wherein an owner of a store is not the same person as the manager, we would note that the statute specifies the exemption, utilizing the hyphenated word "owner-manager." As such, it would clearly appear that the same is applicable to a singular person acting in a dual role. For this reason we are in agreement with your stated opinion; i.e., if the owner of the store and the manager of the store are two separate persons or entities, such business would not then be eligible for the exemption.

In the instance of your present inquiry, the same basic situation would appear to exist if incorporation of such a business were to be effected. In the event a corporation is created, the legal effect is to create a fictitious person in legal theory. This would result in a separation of the "owner-manager" concept since the corporation would only be able to act through its employees and officers. It would also appear that the owner of the stock or a majority of the stock would still only be an employee or officer of the owner of the grocery, which would be the corporation itself. To draw the line of distinction as applicable in such an instance, it would appear that the major stockholder would own the stock only and the fictitious person, i.e., the corporation, would own the grocery establishment. Thus, it is in keeping with the opinion heretofore expressed by this office that in order to come within the exemption set forth under Section 12.1-30-03(28) of the North Dakota Century Code, as amended, the owner must also be the manager of the grocery store. If the grocery store establishment is incorporated, it would appear that the corporation would own the store and someone else, employee, officer, or majority stockholder, as the case may be, would be the manager.

In direct response to your inquiry then, we are of the opinion that if a family grocery store is incorporated and the current owner-manager is majority shareholder of that corporation, the owner-manager concept permitting the exemption under Section 12.1-30-03(28) of the North Dakota Century Code, as amended, is then destroyed and such business would not then be eligible for the exemption. The division of ownership and managership no longer exists.

With regard to your second question concerning whether the current owner-manager must hold the majority stock in the corporation individually in order to qualify for the exemption, our response to your first question makes this observation moot as it would not be a material consideration to the issue since the "owner-manager" concept does not exist in such instances that such a grocery store is

incorporated.

We trust that the foregoing adequately expresses our opinion upon the matters submitted.

Sincerely,

ALLEN I. OLSON

Attorney General